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MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS & CLARK COUNTY

FT. HARRISON VETERANS RESIDENCE, Limited Partnership, Petitioner, vs. MONTANA BOARD OF HOUSING, Respondent, CENTER STREET LP, SWEET GRASS APARTMENTS LP, SOROPTIMIST VILLAGE LP, FARMHOUSE PARTNERS-HAGGERTY LP and PARKVIEW VILLAGE LLP, Intervenors.	Cause No. DDV-2012-356 **RESPONDENT'S RESPONSE IN OPPOSITION TO PETITIONER'S MOTION FOR PRELIMINARY INJUNCTION**

Respondent Montana Board of Housing ("the Board"), by and through its undersigned counsel, hereby submits this Response in Opposition to Petitioner's Motion for Preliminary Injunction.

BACKGROUND

Low Income Housing Tax Credits ("Tax Credits") in the amount of $2.59 million are available for allocation by the Board for 2013, representing $25.9 million in Tax Credits to assist in funding low income housing projects in Montana. Allocation of the 2013 Tax Credits would reasonably be expected to result in approximately 174 residential housing units in Montana communities. Second Affidavit of Bruce Brensdal ("Brensdal Aff."), ¶ 5.

After notice and multiple opportunities for comment, the Board and the Montana

Governor approved the 2013 Qualified Allocation Plan ("QAP"). Representatives of FHVR appeared and commented before the Board regarding the proposed 2013 QAP and also submitted written rule comment. The 2013 QAP has been adopted as a rule under MAPA administrative rulemaking standards. The Board disagreed with FHVR's oral and written comments, as reflected in the 2013 QAP approved for submission to the Governor and in the Notice of Adoption. Brensdal Aff., ¶¶ 6-12.

The 2013 QAP established an application submission deadline of 5:00 p.m. on the third Friday in January, i.e., January 18, 2013. Fourteen (14) applications for 2013 Tax Credits were submitted to the Board by the established deadline. The Board and its staff have not read, reviewed or otherwise processed the applications. The Board is holding the applications pending further order of the Court. FHVR did not submit an application for 2013 Tax Credits by the established January 18, 2013 deadline. Brensdal Aff., ¶ 13.

A preliminary injunction preventing the Board from conducting the 2013 Tax Credit allocation process would delay the allocation process, resulting in significant and irreparable harm to the Board, the LIHTC program, the low income Montanans who would otherwise benefit from the availability of additional affordable housing, and the applicants for 2013 Tax Credits. The facts relating to such harm are set forth in more detail below and in the Second Affidavit of Bruce Brensdal and the additional affidavits filed herein by or on behalf of the Intervenors.

Many of the underlying issues presented by FHVR's Motion for Preliminary Injunction are the same or nearly identical to the issues presented previously with respect to the 2012 QAP and Low Income Housing Tax Credit ("LIHTC") allocation process. The Board requests that, for purposes of the present motion, the Court consider the previous briefs, affidavits and other materials filed to date in this proceeding, and the Board incorporates herein all such briefs, affidavits and materials.

I. FHVR LACKS STANDING TO CHALLENGE THE 2013 QAP.

In its Supplemental Petition and Demand For Jury Trial, FHVR seeks a declaratory judgment that the 2013 QAP is invalid based upon an allegedly unconstitutional provision, i.e., the Montana Presence provision, and based upon allegedly vague provisions. However, FHVR failed to submit an application for 2013 Tax Credits by the established January 18, 2013 application deadline. FHVR therefore lacks standing to challenge the validity of the 2013 QAP

and its Motion for Preliminary Injunction, to the extent based upon the alleged invalidity of the 2013 QAP, should be denied.

II. PRELIMINARY INJUNCTION STANDARD.

A preliminary injunction may be granted in any of the cases enumerated in Mont. Code Ann. § 27-19-201, subsections (1) through (5). These requirements are in the disjunctive, meaning that findings that satisfy one subsection are sufficient. *Mont. Cannabis Indus. Assn. v. State*, 2012 MT 201, ¶ 14, 366 Mont. 224. 286 P.3d 1161.

Injunctions are extraordinary remedies, granted with caution, and in the exercise of sound judicial discretion. *State ex rel. Blackwood v. Lutes*, 142 Mont. 29, 34, 381 P.2d 479, 482 (1963). Injunctive relief represents a principle of equity. The Montana Supreme Court has long recognized that flexible, not cast-iron, rules govern courts of equity. These rules call upon the courts of equity to adapt themselves to the exigencies of the particular case. *Talley Bissell Neighbors, Inc. v. Eyrie Shotgun Ranch, LLC*, 2010 MT 63, ¶ 43, 355 Mont. 387, 228 P.3d 1134.

The limited function of a preliminary injunction is to preserve the *status quo and to minimize the harm to all parties* pending full trial. *Yockey v. Kearns Properties, LLC*, 2005 MT 27, ¶ 18, 316 Mont. 28, 106 P.3d 1185; *see also Four Rivers Seed Company v. Circle K Farms, Inc.*, 2000 MT 360, ¶ 12, 303 Mont. 342, 16 P.3d 342 (court has a duty to balance the equities and minimize potential damage when considering an application for a preliminary injunction); *Benefis Healthcare v. Great Falls Clinic, LLP*, 2006 MT 254, ¶14, 334 Mont. 86, 146 P.3d 714 (court has a duty to minimize the injury or damage to all parties to the controversy when considering an application for a preliminary injunction). Accordingly, in considering a motion for preliminary injunction, the Court must consider the harm that would result to the non-moving parties from the grant of a preliminary injunction and weigh that harm against the harm alleged by the movant.

III. THE REQUESTED INJUNCTION CANNOT BE GRANTED BECAUSE IT WOULD PREVENT THE EXECUTION OF A PUBLIC STATUTE BY OFFICERS OF THE LAW FOR A PUBLIC BENEFIT.

The Court should deny the requested preliminary injunction because Montana law prohibits the grant of an injunction "to prevent the execution of a public statute by officers of the law for the public benefit." Mont. Code Ann. § 27-19-103(4). A regulation adopted by an agency pursuant to a delegation of rule-making authority by the legislature has the force and

effect of a statute for purposes of the statutory provision prohibiting granting an injunction to prevent execution of a public statute. 42 Am.Jur.2d, Injunctions § 181; *Agricultural Labor Relations Board v. Superior Court*, 16 Cal. 3d 392, 401, 546 P.2d 687 (1976).

The Board's allocation of Tax Credits is "execution of a public statute by officers of the law for the public benefit." Federal law provides for the allocation of LIHTCs by each state's "State housing credit agency." 26 U.S.C. § 42(f)(3). The federal government allocates to each State housing credit agency a State housing "credit ceiling" for the calendar year, and the State housing credit agency allocates that credit ceiling amount among applicant projects. *Id.* For purposes of the LIHTC allocations, the State housing credit agency is the state agency specifically authorized by gubernatorial act or State statute to make housing credit allocations on behalf of the State. *See* 42 CFR § 1.42-IT(c)(1).

The Board allocates federal low income housing tax credits by executing its statutory authority under the Montana Housing Act of 1975 and the Montana tax code.[1] The Montana Housing Act of 1975 (the "Act") authorizes the Board to "enter into agreements or other transactions with, and accept grants and the cooperation of, any governmental agency in furtherance of this part, including but not limited to the development, leasing, maintenance, operation, and financing of any housing development". Mont. Code Ann. § 90-6-104(7).

The Legislature has specifically authorized the Board to allocate LIHTCs, providing a property tax exemption for residential property dedicated to providing affordable housing for low income persons where the Board of Housing "has allocated low income housing tax credits to the owner under 26 U.S.C. 42." Mont. Code Ann. § 15-6-221(1)(b). The same statute contains additional requirements that must be followed by applicants before the Board may allocate LIHTCs to an owner. *See* Mont. Code Ann. § 15-6-221(2). The 2013 QAP has been adopted as an administrative rule and, for purposes of this statutory prohibition, is therefore considered a part of the public statute being executed in allocating Tax Credits.

The Board and its members and staff, as officers of the law, are executing public statutes by carrying out the annual low income housing tax credit allocation process. The LIHTC

[1] The Board also allocates Tax Credits pursuant to the Montana Governor's designation of the Board as the State's housing credit agency for purposes of such allocations. On May 1, 1987, the Montana Governor, by Executive order, designated the Montana Board of Housing as the state's housing credit agency authorized to make housing credit allocations on behalf of the State and to carry out the provisions of the federal LIHTC statute. *See* Executive Order No. 2-87, attached as Exhibit V to the second Affidavit of Bruce Brensdal; *see also* ARM 8.111.601.

program and the statutory provisions that authorize the Tax Credit allocation are for the public benefit. In enacting the Montana Housing Act of 1975 (the "Act"), the Montana legislature declared that there is a shortage in Montana of decent, safe, and sanitary housing which is within the financial capabilities of lower income persons and families, and that to alleviate the high cost of housing for these persons it is essential that additional public moneys be made available to assist both private enterprise and governmental agencies in meeting critical housing needs. Mont. Code Ann. § 90-6-102. The allocation of Tax Credits is intended to address the most pressing housing needs within the State of Montana and to meet the needs of low income people within the state. 2013 QAP, at pp. 1, 25, Brensdal Aff., Exhibit Z.

FHVR has asked this Court for a preliminary injunction to prevent the Board from conducting the LIHTC allocation process for 2013. The 2013 QAP, duly adopted by the Board and approved by the Montana Governor, established an application deadline of January 18, 2013, and a process including applicant presentations to the Board at its February meeting, evaluation and scoring of applications, and award of Tax Credits at the Board's April or May meeting. FHVR asks the Court to entirely stop the Board from executing its statutory public function in allocating 2013 Tax Credits. This is an extremely broad request that would prevent public officials from carrying out their duties and bring an entire government funding program to a halt.

Section § 27-19-103(4) prohibits a grant of the requested injunction, unless FHVR can demonstrate that the statutes, rules and QAP are unconstitutional or otherwise invalid, and that execution of these laws invades a property right of FHVR resulting in irreparable injury. In *Spoklie v. Mont. Dept. of Fish, Wildlife & Parks*, 2002 MT 228, 311 Mont. 427, 56 P.3d 349, the Montana Supreme Court held that irreparable injury alone is not sufficient to overcome the prohibition of Mont. Code Ann. § 27-19-103(4), clarifying language in *New Club Carlin v. City of Billings,* 237 Mont. 194, 772 P.2d 303 (1989), suggesting otherwise. *Spoklie*, ¶ 33.

The Court, citing *State ex rel. Freebourn v. Carroll*, 85 Mont. 439, 279 P. 234 (1929), indicated that the prohibition of this section is overcome only where the statute or ordinance involved is unconstitutional or otherwise invalid and where an attempt to enforce it directly invades a property right resulting in irreparable injury – both of these elements are indispensable. *Spoklie*, ¶ 34-35. In *Spoklie*, the Court reversed the district court's refusal to dissolve a preliminary injunction because the preliminary injunction interfered with the execution of a

public statute enacted for the public benefit. *Spoklie*, ¶¶ 29, 35.

As demonstrated in previous briefing in this action, FHVR has no property interest in an award of Tax Credits, even if were to submit the highest scoring application. *See Barrington Cove Limited Partnership v. Rhode Island Housing and Mortgage Finance Corporation*, 246 F.3d 1, 5-6 (1st Cir. 2001); *DeHarder Investment Corp. v. Indiana Housing Finance Authority*, 909 F. Supp. 606, 613-14 (S.D. Indiana 1995), discussed in Respondent's Brief in Support of Motion to Dismiss filed June 21, 2012, at pp. 11-14. Moreover, even assuming for the sake of argument that the Court were to find it likely that FHVR will prevail in its claim that the Montana Presence provision is unconstitutional, FHVR has no property interest in an award. Moreover, if the Court finds any such likelihood, it could be addressed by narrowly drawn injunctive relief, affecting only the particular provision, which would interfere far less with the Board's execution of the Tax Credit statutes and program.

IV. EVEN IF FHVR COULD OVERCOME THE PROHIBITION ON ENJOINING EXECUTION OF A PUBLIC STATUTE, IT HAS FAILED TO MEET THE APPLICABLE STANDARDS FOR GRANT OF A PRELIMINARY INJUNCTION.

A. FHVR HAS NOT DEMONSTRATED A LIKELIHOOD OF SUCCESS ON THE MERITS.

FHVR argues that it is entitled to a preliminary injunction under Subsection (1) of 27-19-201, because it alleges it is entitled to an award of 2013 Tax Credits under the 2013 QAP's corrective award set-aside provision or a declaration that the 2013 QAP is invalid. Mont. Code Ann. § 27-19-201(1) provides that an injunction may be granted "when it appears that the applicant is entitled to the relief demanded and the relief or any part of the relief consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually." FHVR has not shown that it is entitled to the relief it demands.

For an injunction to issue under § 27–19–201(1), MCA, an applicant must show that he has a legitimate cause of action and that he is likely to succeed on the merits of that claim, as well as demonstrating that an injunction is an appropriate remedy. *Sandrock v. DeTienne*, 2010 MT 237, ¶ 16, 358 Mont. 175, 243 P.3d 1123. Although a district court commits error by determining the ultimate merits of the case at the preliminary injunction stage, obviously the Court must consider the merits of the movant's claims in order to determine whether there is a likelihood of success on the merits and whether an injunction is appropriate. Mont. Code Ann. §

27-19-201 requires that it do so, at least in a preliminary fashion. *See City of Whitefish v. Board of Cnty. Comm'rs of Flathead County*, 2008 MT 436, ¶ 30, 347 Mont. 490, 199 P.3d 201 (Warner, J., dissenting). While prevailing on the merits need not be certain, it must nonetheless be likely or probable.

FHVR argues that it has met this standard with respect to its original Petition, regarding the 2012 allocation award determination, and that it is necessary to enjoin allocation of 2013 Tax Credits so that such credits will be available for award to FHVR under the 2013 Corrective Award set aside provision.[2] As FHVR notes, the issues regarding the 2012 award determination have been fully briefed and the Board hereby incorporates by reference and refers the Court to those briefs and related materials. Based upon the Board's previous submissions to the Court on these issues, the Board submits that FHVR has not demonstrated a likelihood or probability of success on the merits of its 2012 claims.

Moreover, even assuming for the sake for argument that FHVR has demonstrated such a likelihood, there is no reason to enjoin the 2013 allocation process for this reason. Although the 2014 QAP has not yet been adopted, if FHVR's 2012 claims remain unresolved, staff will recommend and it is reasonable to assume that the Board will include the same Corrective Award provision in the 2014 and subsequent year QAPs for the same reasons the provision was included in the 2013 QAP. Accordingly, in the event FHVR prevails on its claim that it was entitled to an award of credits in the 2012 allocation process, it is reasonable to assume that Tax Credits will be available to fund its application from a subsequent year's credit ceiling rather than 2013 credits. Brensdal Aff., ¶ 14.

FHVR also argues that it meets the preliminary injunction standard with respect to its claim that the 2013 QAP is invalid. FHVR argues that the 2013 QAP is invalid, alleging that the Montana Presence provision violates the dormant commerce clause of the U.S. Constitution and alleging that several provisions of the 2013 QAP are unconstitutionally vague. FHVR argues, therefore, that it cannot determine what criteria will be used to evaluate its application, and therefore could not submit an application for 2013 Tax Credits. These arguments lack merit and the preliminary injunction should be denied.

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[2] FHVR's argument is inconsistent with the fact that it now seeks to invalidate the 2013 QAP, which contains the very Corrective Award provision it purportedly seeks to preserve. Invalidation of the 2013 QAP would revive the mootness argument presented in the Board's pending motion to dismiss or for summary judgment.

i. The Montana Presence Provision Does Not Violate the Dormant Commerce Clause.

FHVR argues that it is entitled to preliminary injunctive relief because the 2013 QAP's Montana Presence provision discriminates against it in violation of the federal Constitution. This is the same argument asserted by FHVR with respect to the 2012 award determination process. FHVR alleges that this provision violates the dormant commerce clause of the U.S. Constitution, relying upon the same arguments previously presented. This issue has already been briefed and the Board incorporates its previous arguments herein by reference. For the same reasons presented in the Board's previous briefs on this issue, the Board submits that FHVR's argument lacks merit.

FHVR asserts that language in the 2013 QAP Montana Provision -- language indicating that Montana Presence does not require that team members be Montana businesses, entities or residents – constitutes an "attempt to sanitize these criteria." To the contrary, this language clarifies what is meant by "presence" and clarifies that the Board is concerned with familiarity and experience in Montana, not status as an in-state or out-of-state entity. Further, FHVR's argument based upon the comment of a single Board member at the October Board meeting fails to demonstrate a Board preference for in-state applicants. See Brensdal Aff., ¶21.

The Board consists of members "informed and experienced in housing, economics, or finance." Mont. Code Ann. § 2-15-1814(2). The Board, acting in a quasi-legislative capacity, has determined that familiarity and experience with development or project operation in Montana is a relevant factor in seeking to provide a better quality product for the intended program beneficiaries and in seeking to assure that the development team can successfully plan, permit, develop, construct and bring a project into service in the local Montana building environment within time limits and in compliance with requirements. This determination is within the authority and expertise of the Board, and it is reasonable. It is not the Court's role to substitute its judgment for that of the Board with respect to such matters by trying the factual basis for the Board's determination.

Moreover, neither the Board nor the 2013 QAP assume that out of state applicants are unable to successfully complete a project. The Montana Presence provision merely recognizes – reasonably and properly – that experience in Montana is valuable and worth consideration. Such experience is not determinative, but is merely one of many considerations.

In any event, even assuming for the sake of argument that the Montana Presence provision is likely or probably unconstitutional, this is not a sufficient basis for enjoining the entire 2013 allocation process. Any such issue could be addressed by narrowly drawn injunctive relief, i.e., a preliminary injunction prohibiting the Board from applying or considering the Montana Presence provision in the 2013 allocation process. Such an approach would address FHVR's claim without unnecessarily interfering with the Board's execution of the Tax Credit statutes and program.

ii. The Cited Provisions of the 2013 QAP are Not Unconstitutionally Vague.

FHVR also argues that the 2013 QAP is invalid because some of its provisions, allegedly, are unconstitutionally vague. In this regard, FHVR cites 3 provisions of the 2013 QAP: Project Location, Energy and Green Requirements, and completeness of applications. In fact, these provisions are clear and unambiguous, especially considering the revisions made from the 2012 to the 2013 QAP. FHVR's specious vagueness arguments should be rejected.

"Unconstitutional vagueness" is a constitutional due process argument. A party must have standing to raise a challenge to a statute for unconstitutional vagueness. *State v. Dixon*, 2000 MT 82, ¶ 18, 299 Mont. 165, 998 P.2d 544. Having failed to submit an application for 2013 Tax Credits and having failed to demonstrate that the 2013 QAP did not allow them to submit an application, FHVR lacks standing to raise a vagueness challenge to the 2013 QAP.

Even assuming that FHVR has standing to challenge the 2013 QAP on vagueness grounds, FHVR has failed to demonstrate any likelihood of succeeding on its claims that the QAP provisions are unconstitutionally vague. Statutes carry a presumption of constitutionality. The party challenging the statute carries the burden of proving the statute's unconstitutionality beyond a reasonable doubt. A non-criminal statute is unconstitutionally vague if a person of common intelligence must guess at its meaning. The Montana Supreme Court presumes that a person of average intelligence can comprehend a term of common usage contained in a statute. *Wing v. State Dept. of Transportation*, 2007 MT 72, ¶ 12, 336 Mont. 423, 155 P.3d 1224.

In *Wing*, the Court held that the term "receipt" constitutes a term of common usage that does not connote an obscure or incomprehensible meaning. The Court presumed that a person of average intelligence could comprehend that the term "receipt" as used in the statute in question, which required receipt of a claim against the state within a certain time period, and that the plain

language of the statute set forth a clear time for when the tolling of the statute of limitations begins. *Wing*, ¶ 13. The Court noted that while "receipt" of a claim could vary, depending on whether the claimant chose to hand deliver the claim or to deliver the claim by mail, the Court did not require "perfect clarity and precise guidance" to uphold a statute's constitutionality. The Court noted that it deems a statute to be unconstitutionally vague if it specifies "no standard of conduct" at all. *Wing*, ¶ 14. The Court concluded that a person could readily determine the exact date specified in the statute through several means, including by contacting the agency, and that nothing in the statute required a person of common intelligence to guess at the meaning of the statute. *Wing*, ¶ 15; *see also Rierson v. State*, 614 P.2d 1020, 1023, 188 Mont. 522, 526 on rehearing 622 P.2d 195, 191 Mont. 66 (a statute is not unconstitutionally vague merely because clearer and more precise language might have been used).

In *Montana Media, Inc. v. Flathead County*, 2003 MT 23, 314 Mont. 121, 63 P.3d 1129, relied upon by FHVR, the Court denied the plaintiff's claim that certain local sign ordinances were unconstitutionally vague. There, plaintiff argued that the vague nature of the ordinances granted officials sweeping authority to interpret the ordinances as he or she saw fit and that the ordinances were susceptible to inconsistent and arbitrary application. *Montana Media*, ¶ 57. The Court applied the same test as applied in *Wing,* i.e., that a noncriminal statute or regulation is unconstitutionally vague if a person of common intelligence must necessarily guess at its meaning. But the Court stated, "however, a term is not vague simply because it can be dissected or subject to different interpretations." *Montana Media*, ¶ 58. The Court stated that it is required to uphold the constitutionality of a statute when that can be accomplished by a reasonable construction of the statute. *Id.* The Court found no vagueness or uncertainty in the meaning of the terms used in the challenged ordinances. *Montana Media*, ¶¶ 59-62.

FHVR argues that the Project Location provision of the 2013 QAP fails to indicate what considerations will be used to evaluate project location. FHVR made the same argument regarding the Project Location provision in the 2012 QAP that it now makes regarding the 2013 QAP provision. The Board has previously responded to these arguments and incorporates its previous arguments here by reference.

The 2012 version of this provision was reasonably clear, but the Board revised the Project Location provision from the 2012 version to the 2013 version to make it even clearer, providing as follows:

> **Project Location* (0-3 points)**
> Development is located in an area where amenities and/or essential services will be available to tenants (schools, medical services, shopping, grocery store, bank, police, fire station, transportation, etc.). In evaluating the development location under this section, considerations will include the relative proximity of the development to such amenities and essential services and/or the availability of public or contracted transportation to such amenities and services, the targeted tenant population and other relevant factors. (0-3 points)

2013 QAP, at p. 21.

This provision is not vague or ambiguous, and does not require a person of common intelligence to guess at its meaning. The provision contains terms of common usage, and as the Montana Supreme Court presumes, a person of average intelligence can comprehend a term of common usage contained in a statute. The provision clearly indicates the determinative factors – availability of amenities and essential services to tenants, considering relative proximity to such services. Transportation is specifically listed as an amenity or essential service, as it relates significantly to availability. This provision would have allowed FHVR to address its relative lack of proximity to such services and amenities by providing for adequate transportation services for tenants.

FHVR argues that the phrase "other relevant factors" offers no indication of what considerations will be used to evaluate project location. However, reading the provision as a whole it is apparent that "other relevant factors" is defined by reference to the controlling consideration of availability of amenities and/or essential services to tenants. Similarly, the use of "etc." in addition to the listed items "schools, medical services, shopping, grocery store, bank, police, fire station, transportation" is defined by the phrase "amenities and/or essential services." This provision is not vague or lacking in specifics or standards.

FHVR also makes the same argument regarding the Green/Energy provision in the 2013 QAP that it made regarding the 2012 QAP provision, arguing that the provision fails to indicate whether or not threshold scoring must be received before discretionary points may be awarded. FHVR argues that the word "threshold" is somehow insufficient to indicate what the common

usage of the term imports, i.e., that the threshold items must be met before points will be allowed for "discretionary" items. The Board has previously responded to these arguments and incorporates its previous arguments herein by reference. Again, the Montana Supreme Court presumes that a person of average intelligence can comprehend a term of common usage contained in a statute. The term "threshold" is such a term. FHVR's argument would write the word "threshold" out of the QAP and continues to lack merit.

FHVR also argues that the 2013 QAP is ambiguous and unconstitutionally vague because it provides that applications must be complete but also contains a provision to address minor errors. FHVR argues that this leaves applicants to guess as to which standard will be applied. This argument is absurd. Apparently, FHVR suggests that an applicant will "guess" as to which requirements it should actually complete and which requirements it should ignore in its application submission. Obviously, applicants are to make their applications complete. However, sometimes minor errors occur and the QAP provision merely provides that these will not disqualify the application from consideration. There is nothing "unconstitutionally vague" about this provision.

FHVR seeks to elevate rule construction and interpretation arguments into a constitutional vagueness claim. The Board previously responded in detail to FHVR's arguments regarding the alleged flaws in the QAP language, such as a purported lack of clarity, and lack of definitions. Moreover, statutory terms are not vague simply because they can be dissected or subjected to different interpretations, or merely because clearer and more precise language might have been used, or because statutory terms have not been defined. As the Montana Supreme Court has stated, the constitutionality of a statute must be upheld when that can be accomplished by a reasonable construction of the statute. *Montana Media*, ¶ 58.

Further, FHVR is on notice of the Board's interpretation and application of these QAP provisions based upon the 2012 allocation process and this litigation. In *City of Billings v. Albert*, 2009 MT 63, 349 Mont. 400, 203 P.3d 828, in a case challenging a criminal statute for vagueness, the Montana Supreme Court found held that prior warnings by law enforcement to the defendant constituted actual notice to the defendant of what was required to comply with the statute. Here, FHVR has been put on actual notice of the meaning of these provisions and cannot legitimately claim that it is unable to submit an application due to any alleged lack of clarity.

The requested preliminary injunction should be denied because FHVR is not likely to succeed on the merits of its claims or that it is entitled to the relief demanded. Moreover, the Montana Supreme Court has indicated that a likelihood of success on the merits is not always sufficient, in and of itself, to warrant injunctive relief. There must also be a showing that, absent a preliminary injunction, the applicant would suffer harm which could not be adequately remedied after a trial on the merits and, therefore, a preliminary injunction is necessary to maintain the status quo and minimize harm to the parties. In other words, the applicant also *must* make a showing of irreparable harm. *M.H. v. Montana High School Ass'n*, 280 Mont. 123, 35-36, 929 P.2d 239, 247 (1996).

B. FHVR HAS NOT DEMONSTRATED THAT IT WILL SUFFER IRREPARABLE HARM IF THE 2013 LIHTC ALLOCATION PROCESS PROCEEDS.

FHVR next argues that it is entitled to a preliminary injunction under Subsection (2) of 27-19-201, because permitting the Board to conduct the 2013 allocation process would greatly or irreparably harm FHVR. Mont. Code Ann. § 27-19-201(1) provides that an injunction may be granted "when it appears that the commission or continuance of some act during the litigation would produce a great or irreparable injury to the applicant." FHVR has not shown that it would be harmed as a result of permitting the 2013 Tax Credit allocation to go forward.

As a preliminary matter, it must be recognized that a court may conclude that violation of a constitutional right is an irreparable injury "only after a plaintiff has demonstrated probable success on the merits of a claim." *Bitterrooters for Planning v. Board of Cnty. Comm'rs of Ravalli Co.*, 2008 MT 249, ¶ 26, 344 Mont. 529, 189 P.3d 624. The two statutory bases for granting a preliminary injunction in subsections (1) and (2) -- namely, the "likelihood of success on merits" basis and the "irreparable injury" basis — are not unrelated. The irreparable injury basis for granting a preliminary injunction is based on an implicit determination that the applicant is likely to succeed on his or her underlying claim and, as a result, would suffer a "wrong or damage done to ... his person, rights, reputation, or property" if some act were committed or allowed to continue during the litigation. *M.H. v. Montana High School Ass'n*, 280 Mont. 123, 247, 929 P.2d 239, 35-36 (1996).

In other words, it is not enough for FHVR to merely allege injury – it must show that

such injury would result from the probable claims it has asserted. However, as shown above, FHVR has not demonstrated a likelihood of success on the merits. Moreover, FHVR's allegations of harm from the 2013 Tax Credit allocation process are speculative. FHVR argues that allowing the 2013 allocation process to proceed would "permanently foreclose" the Corrective Award provision as a remedy in the event that it prevails on its 2012 challenge. This scenario is highly improbable.

As noted above, although the 2014 QAP has not yet been adopted, if FHVR's 2012 claims remain unresolved, staff will recommend and it is reasonable to assume that the Board will include the same corrective award provision in the 2014 and subsequent year QAPs for the same reasons the provision was included in the 2013 QAP. Brensdal Aff., ¶ 14. Therefore, it is not probable that allowing the 2013 allocation process to proceed would harm FHVR by depriving it of this Corrective Award opportunity.

FHVR argues that the alleged vagueness of the QAP provisions prevents it from making a proper determination whether to submit a 2013 application or what attributes its project should possess. In fact, there is no legitimate reason that FHVR could not have applied for and competed strongly for a 2013 Tax Credit award. The fastest and most efficient opportunity for FHVR to obtain a tax credit award would have been to submit an application for the 2013 allocation. The QAP provisions are clear and provide FHVR with sufficient notice of the requirements. Although there would have been no guarantee or certainty of success, as the relative strength of competing applications could not be known in advance, FHVR could have submitted a very competitive application but declined to apply at all. By such failure, FHVR has caused or greatly contributed to the potential harm it seeks to avoid by seeking injunctive relief.

FHVR also argues that the VA can terminate its lease for the project land at any time if the VA determines that the project is not viable and that "further delay" in an award raises the risk that the federal government will terminate the lease, destroying the viability of the project. While the lease does allow the VA to terminate the lease if it determines the project is not viable, FHVR has offered no evidence that the VA is contemplating exercising this termination provision or that allowing the 2013 allocation process to go forward would cause the VA to do so. Moreover, FHVR elected not to submit a 2013 application and has by its own action

foreclosed what is likely the speediest opportunity to obtain an award of credits and avoid any such lease termination.

The requested preliminary injunction is not necessary to preserve the viability of the FHVR project. It may well be that FHVR's all-or-nothing decision not to submit a 2013 Tax Credit application may ultimately destroy the project's viability, but the 2013 allocation process will not do so. The preliminary injunction request should be denied because FHVR has not shown that it will suffer injury or harm as a result of any wrong by the Board or that an injunction is necessary to preserve an opportunity for FHVR to obtain an award of Tax Credits.

C. FHVR HAS NOT DEMONSTRATED THAT THE BOARD IS ABOUT TO DO AN ACT THAT VIOLATES ITS RIGHTS AND THAT WOULD MAKE A JUDGMENT INEFFECTUAL.

FHVR next argues that it is entitled to a preliminary injunction under Subsection (3) of 27-19-201, because the Board is attempting to allocate 2013 Tax Credits on unconstitutional grounds, which would violate FHVR's rights and make any later judgment ineffectual. Mont. Code Ann. § 27-19-201(3) provides that an injunction may be granted "when it appears during the litigation that the adverse party is doing or threatens or is about to do or is procuring or suffering to be done some act in violation of the applicant's rights, respecting the subject of the action, and tending to render the judgment ineffectual." As demonstrated above, FHVR has not shown that it has any right that would be violated by the process or that the 2013 allocation process would make any potential judgment ineffectual.

The requested preliminary injunction should not be granted because the Court has a duty to minimize the harms to all parties and the injunction would do the opposite to the non-moving parties. *Four Rivers, supra.* Moreover, the alleged harm to FHVR is outweighed by the damage the proposed injunction would cause the other parties, and the requested injunction, if issued, would be adverse to the public interest. *See Shammel v. Canyon Resources Corp.*, 2003 MT 372, ¶ 17, 319 Mont. 132, 82 P.3d 912, citing *Van Loan v. Van Loan,* 271 Mont. 176, 182, 895 P.2d 614, 617 (1995); *Doe v. Community Medical Center, Inc.*, 2009 MT 395, ¶ 19, 353 Mont. 378, 221 P.3d 651.

i. The Harm to the Board, Applicants and Program Beneficiaries That Would Result from a Preliminary Injunction Outweighs Any Harm to FHVR.

The threatened injury to FHVR does not outweigh the damage that the proposed preliminary injunction would cause to the Board, the LIHTC program, the Intervenors, prospective applicants and the intended beneficiaries of the program. The balance of equities militates against issuance of the requested injunction.

The delay in the 2013 allocation process that would ensue from issuance of a preliminary injunction would cause significant and irreparable harm to the Board, the LIHTC program, the low income Montanans who would otherwise benefit from the availability of additional affordable housing, and the applicants for 2013 tax credits. Bresndal Aff., ¶ 15.

If delay from a preliminary injunction prevents 2013 Tax Credits from being allocated before the end of 2014, the 2013 Tax Credits would be entirely lost to the State of Montana unless the Board also delays the allocation process for 2014 and subsequent years. If 2014 Tax Credits or later year's Tax Credits were awarded prior to 2013 Tax Credits, the 2013 Tax Credits would revert to the federal government and would be reallocated to other states. If the 2013 Tax Credits revert to the federal government, the low income housing projects that would otherwise be financed and built in Montana with 2013 credits would not be developed or built. This would mean that the expected 174 low income housing units would be lost to the State of Montana and the low income Montanans who otherwise would be provided with affordable housing. Brensdal Aff., ¶ 16.

A preliminary injunction preventing the Board from conducting the 2013 Tax Credit allocation process would also cause the potential loss or delay in receipt of funding for the Board. The Board would be delayed in receiving, or potentially would lose altogether, LIHTC application fees in the amount of 1.5% of all credits applied for ($107,372 for applications received for 2013), reservation fees in the amount of 3.5% of all credits awarded and reserved ($91,808.96 for 2013), the 2013 credit cap amount of $2.59 million X 10 years, or $25.9 million in Tax Credits, and compliance fees totaling $483,720 over 46 years. Brensdal Aff., ¶ 17.

It is unknown when the Court will decide FHVR's allegations regarding the 2013 QAP. If the Court determines that any part of the 2013 QAP is invalid and must be revised before the 2013 allocation proceeds, the Board would have to go all the way back through the process of

public notice and comment, governor approval, rulemaking and new applications. This would substantially delay the 2013 allocation process.

Any substantial delay in the 2013 allocation process would most likely lead to a loss of the current fixed 9% applicable credit percentage rate ("APR") for 2013 credits. The APR limits the amount of tax credits that can be awarded for any particular project and would likely cause insurmountable funding gaps for the projects. As a result, some or all of the projects would become unviable and would be lost to the intended program beneficiaries. Brensdal Aff., ¶¶ 18-20.

In addition, the 2013 applicants would lose their substantial financial investment in developing the projects to the application stage. *See* Affidavits of Jack Jenks, Stephen Vander Schaaf, Alex Burkhalter, Jim Morton, GMD Development LLC and Buffalo Grass Apartments, LLLP, on file herein. While applicants are not guaranteed recovery of their development costs, any successful applicant would be expected to recover their investment through the completion of the funded project. Brensdal Aff., ¶ 20.

Whatever the potential loss or harm to FHVR from not enjoining the 2013 allocation process, a loss at least 6 to 10 times greater would accrue to the Board, the 2013 applicants and the low income Montanans that would otherwise benefit from their 2013 projects. The balance of equities militates against issuance of the requested injunction.

ii. The Requested Preliminary Injunction Would Be Adverse to the Public Interest.

The requested injunction would be adverse to the public interest. In *Montana Contractors' Assoc. v. Secretary of Commerce*, 439 F.Supp. 1331 (D. Mont. 1977), contractors sought a preliminary injunction enjoining issuance of contracts under the Public Works Employment Act of 1977, based upon alleged racial discrimination. The Act appropriated federal funds for public works projects and required that a minimum percentage of the funds be expended for minority business enterprises. The purposes of the Act were alleviation of unemployment and stimulation of the national economy by assisting state and local governments to build badly-needed public facilities. The Court agreed that the Act discriminated on the basis of race alone and that the plaintiff had lost, and would continue to lose, equal bidding opportunities and contracts because of the minority enterprise requirement. 439 F.Supp. at 1332-33.

The Court, noting that the grant of a preliminary injunction is within the court's discretion, stated that where the public interest is involved, the Court has even broader discretion regarding issuance of a preliminary injunction. The Court noted that courts of equity may, and frequently do, go much further both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved. *Id.* at 1334.

Balancing the equities, the Court denied injunctive relief, finding that an injunction would frustrate the Congressional policy behind the legislation, adversely affecting a substantial number of workers. More importantly, the Court noted, an injunction would adversely affect the entire funding program, stopping millions of dollars in grant funding and shutting down an entire program in the State of Montana. *Id.* at 1335.

Similarly, here the proposed preliminary injunction would frustrate the Congressional and Montana Legislature's purposes behind the LIHTC program and statutes, and would adversely affect the entire funding program, substantially delaying or even causing a loss of more than $25 million in federal tax credits and related developments for low income housing in the State of Montana. The injunction would adversely affect the public interest and should be denied.

V. THE REQUESTED INJUNCTION IS NOT AN APPROPRIATE REMEDY.

The Board submits that the 2013 QAP is valid, that no injunction is necessary to preserve effective relief in the event FHVR prevails regarding its 2012 award challenge, and that no preliminary injunction should be issued. However, even if the Court determines that injunctive relief is appropriate, FHVR's proposed injunction is unnecessarily broad in scope and would unnecessarily interfere with the Board's statutory functions in carrying out the Tax Credit allocation process. There are much narrower alternatives that would avoid any potential harm to FHVR while still allowing the 2013 allocation process to move forward.

If the Court is concerned about the constitutionality of the 2013 QAP's Montana Presence provision, that concern could be addressed by narrowly enjoining application of only that QAP provision. Board staff could score the applications both with and without the Montana Presence provision. The Board could make awards without considering the Montana Presence provision, and could also make a provisional determination of its awards taking the provision into consideration. If by the time of the award determination the Court has not decided the validity of the 2013 Montana Presence provision, the Board could decide to waive that provision and award

credits without considering it. If the Court had determined that the provision is valid, the Board could award credits based upon the scores including the Montana Presence provision. This would address any FHVR objection regarding the Montana Presence provision while allowing the 2013 allocation process to move forward.

If the Court is concerned about preserving 2013 credits for award under the Corrective Award set aside provision, this concern could also be addressed without enjoining the entire 2013 allocation process. The Court could simply enjoin the Board from awarding the entire available 2013 credit amount, requiring that the Board hold back enough 2013 credits to fund the amount of credits requested by FHVR in 2012, pending a determination by the Court. The Board could then proceed with the 2013 allocation process as to the remainder of the credits. A provisional or conditional award of the remaining amount could be made – subject to resolution of the litigation -- but no reservation agreement could be entered into with the provisional awardee until and unless the Court ruled in the Board's favor. If the Board eventually prevailed in the lawsuit, the Board could enter into a reservation agreement with the conditional awardee. If FHVR eventually prevailed, the Board could enter into a reservation agreement with FHVR. Again, this would allow the allocation process to go forward while preserving 2013 credits to fund FHVR's application in the event that the Court determined FHVR was entitled to an award under the 2012 process.

FHVR's requested preliminary injunction is unnecessary broad. The Board disputes that any injunction is necessary or appropriate. However, in the event the Court determines that some kind of preliminary injunctive relief is necessary, an appropriately narrow order should be issued rather than the broad relief requested by FHVR.

VI. IF THE COURT DETERMINES THAT A PRELIMINARY INJUNCTION SHOULD ISSUE, IT SHOULD REQUIRE THAT FHVR POST A BOND.

As FHVR concedes, a bond is generally required when the Court issues a preliminary injunction. FHVR incorrectly argues that the Board has no financial stake in pursuing the 2013 allocation process and that no applicants will suffer any financial damage as a result of the requested injunction. FHVR's arguments that bond should be waived lack merit. The financial stakes are high for the Board and the applicants. FHVR's requested preliminary injunction threatens very substantial financial harm to the parties, including a loss of substantial federal funding for low income housing in the state. *See* Section IV.C.i., above. If the Court determines

that preliminary injunctive relief is appropriate, it should require that FHVR post bond sufficient to cover the threatened harm to the other parties, in an amount to be determined by the Court after a hearing.

CONCLUSION

FHVR has failed to demonstrate that it meets the standard for a grant of preliminary injunctive relief. FHVR is unlikely to succeed on the merits of its claims and its claims of harm are speculative. The harm that would result to the Board, other applicants and the intended beneficiaries of the program from issuance of the requested injunctive relief far outweigh any potential harm to FHVR and the requested preliminary injunction would be adverse to the public interest. The Court should deny the motion for preliminary injunction and lift the temporary restraining order previously issued. In the Court finds that preliminary injunctive relief is necessary and appropriate, a narrowly drawn order would be sufficient to address FHVR's interests and FHVR should be required to post bond in an appropriate amount to be determined at hearing.

Respectfully submitted this 24th day of January, 2013.

LUXAN & MURFITT, PLLP

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CERTIFICATE OF SERVICE

I, Gregory G. Gould, certify that on the 24th day of January, 2013, a true and accurate copy of the foregoing RESPONDENT'S RESPONSE IN OPPOSITION TO PETITIONER'S MOTION FOR PRELLIMINARY INJUNCTION was duly served upon counsel of record listed below by depositing the same, postage prepaid, in the United States mail to:

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